

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL R. BECKER
Claimant

VS.

GREIF, INC.
Respondent

AND

**TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA**
Insurance Carrier

Docket No. 1,058,530

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the March 21, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Deborah K. Mitchell of Wichita, Kansas, appeared for claimant. Sylvia B. Penner of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 17, 2012, discovery deposition of claimant;¹ the transcript of the March 20, 2012, preliminary hearing and exhibits thereto; the transcript of the March 12, 2012, deposition of Dan Evans and exhibits thereto; the transcript of the March 12, 2012, deposition of Troy Randall and exhibit thereto; the transcript of the March 12, 2012, deposition of Shawn David and exhibit thereto; and all pleadings contained in the administrative file.

¹ At pages 4-5 of the preliminary hearing transcript the parties agreed that the February 17, 2012, discovery deposition of claimant would be admitted for the ALJ's review.

ISSUES

Claimant alleged in his Application for Hearing that he injured his right and left shoulders by repetitive trauma on or about September 19, 2011, and each working day thereafter while employed by respondent. Claimant asserts he reported his shoulder problems to a supervisor and continued to work. On September 26, 2011, claimant alleges he again reported the right shoulder problems. At the preliminary hearing claimant alleged a right shoulder injury and sought payment of outstanding medical bills for treatment of the right shoulder, that a physician be authorized to provide medical treatment for the right shoulder, and temporary total disability benefits (TTD) beginning November 16, 2011.

The ALJ ordered all outstanding medical bills paid and appointed Dr. David Hufford as claimant's authorized treating physician. ALJ Clark also ordered TTD at the rate of \$454.28 per week until claimant was released.

Respondent appeals. It argues claimant's notice was defective, because claimant failed to include the time, date, place, person injured and particulars of his injury as required by K.S.A. 2011 Supp. 44-520. Respondent also contends claimant's injury did not arise out of and in the course of his employment. Respondent asserts claimant had a pre-existing right shoulder condition that was aggravated by claimant's work activities and cites K.S.A. 2011 Supp. 44-508(f), which states an injury is not compensable solely because it aggravates, accelerates or exacerbates a pre-existing condition or renders a pre-existing condition symptomatic. Finally, respondent argues claimant failed to prove his work activities were the prevailing factor in causing claimant's injury and need for medical treatment.

The issues for the Board are:

1. Did claimant give timely notice as required by K.S.A. 2011 Supp. 44-520? In order to resolve the issue of timely notice, a determination must be made as to claimant's date of injury.
2. If claimant gave timely notice, did claimant sustain a personal injury by repetitive trauma arising out of and in the course of his employment with respondent? Was claimant's right shoulder injury merely an aggravation of a pre-existing condition?
3. Did claimant prove by a preponderance of the evidence that his repetitive work activities were the prevailing factor causing his present need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

As of September 19, 2011, claimant had worked at respondent's packaging plant for 15 months² as a production warehouse worker. Claimant's job was to remove steel drums from a conveyor and stacked three-high onto a pallet. After the pallet was loaded, it was placed in a trailer using a forklift. The lightest drums weighed 30 pounds, the 55-gallon drums weighed up to 70 pounds and the 85-gallon drums weighed more.³ On some occasions claimant would lift and stack 326 drums per hour. Claimant worked shifts lasting from eight to 11 hours, and stacked drums four hours a day. The rest of his shift was spent assembling the drums and performing other work duties.

On September 19, 2011, claimant reported his shoulder was popping to his supervisor, Troy Randall, but continued working. Claimant denied having any problems with his right shoulder before being employed by respondent. Nor did he report any right shoulder problems to anyone at respondent prior to September 19, 2011. At the preliminary hearing, claimant testified he never specifically told Mr. Randall the shoulder-popping was work related and said, "I didn't know what it was."⁴ Nor did claimant request medical treatment.

On September 26, 2011, claimant reported to Mr. Randall right shoulder pain while loading a trailer. Claimant again acknowledged Mr. Randall was not specifically told the right shoulder pain was work related. At the preliminary hearing claimant testified he told Mr. Randall, "I can't do this right now, I need to be out of this trailer, it's killing me to pick these drums up above my head."⁵ At his deposition claimant indicated he had just loaded 652 drums when he approached Mr. Randall about the shoulder pain and said, "every time I pick up a drum I get a sharp pain, I can't do it, my arm is killing me, I have to get out of that trailer, I can't pick them up right now."⁶ Claimant assumed Mr. Randall would figure the shoulder pain was work related. According to claimant, he told Mr. Randall of needing medical treatment. The next day claimant again tried to load steel drums, but could not do so due to right shoulder pain and told Mr. Randall.

Claimant made an appointment to see Dr. Teran R. Naccarato but saw Dr. Naccarato's physician assistant, Lauren Streiff, on September 29, 2011. Her notes from that visit indicated claimant reported right shoulder pain with no specific injury. Ms. Streiff noted claimant lifted heavy objects weighing 40 to 80 pounds, 1,000 times

² Claimant worked for respondent six months through a temporary agency and then was hired by respondent in January 2011.

³ Becker Depo. at 39.

⁴ P.H. Trans. at 8.

⁵ *Id.*, at 9.

⁶ Becker Depo. at 46.

overhead daily. Her diagnosis was right shoulder pain, bicipital tendinitis and rotator cuff syndrome. X-rays were taken, and they were normal. Ms. Streiff also ordered an MRI of the right shoulder and gave claimant a note that stated, "must restrict overhead lifting until further notified."⁷ He took the note to Mr. Randall and was given work in the press room, which did not require overhead lifting. Claimant used vacation time to take off work from September 30 through October 4 or 5, 2011.

Claimant underwent a right shoulder MRI on October 3, 2011. The radiologist's impression was that there was no rotator cuff tear and claimant had a small amount of fluid within the subacromial-subdeltoid bursa and a small amount of fluid seen tracking along the biceps tendon sheath. The radiologist indicated, "These findings are thought to be due to bursitis as no rotator cuff tear is identified."⁸

Claimant got the MRI results a week to a week and one-half later. According to claimant, he was informed he had bursitis from overhead lifting. Physical therapy was recommended and records from the William Newton Hospital in Winfield, Kansas, indicated claimant began physical therapy on October 13, 2011. Claimant testified that until he got the MRI results, he was uncertain whether the right shoulder pain might have been caused by loading the trailers with barrels.

After claimant received the MRI results, he discussed them with Mr. Randall. Claimant testified he stated to Mr. Randall, "I told him it was from overworking my shoulder, and the pain started in the trailer, and I said, 'Well, I don't know if I should just go ahead and pay this or file it as work comp.'"⁹ According to claimant, Mr. Randall indicated claimant needed to do what he had to do, but that claimant would likely be fired if he filed a claim.

Sometime after speaking to Mr. Randall, claimant attempted to contact Plant Manager Dan Evans about the injury, but Mr. Evans was not in. Claimant instead met with Quality Assurance Specialist Shawn David. Claimant told Mr. David about the right shoulder injury and that it was caused by overuse of the arm. The next day, claimant saw Mr. Evans in the warehouse and spoke to him about having bursitis. Claimant showed Mr. Evans how the overhead lifting motion was causing the bursitis. According to claimant Mr. Evans never suggested claimant file for workers compensation.

Dr. Naccarato's note from claimant's appointment on October 21, 2011, indicated claimant's right shoulder MRI was normal. Dr. Naccarato noted claimant had right shoulder pain, worse with lifting items at work and that claimant's condition was somewhat chronic.

⁷ Evans Depo., Ex. 7.

⁸ P.H. Trans., Cl. Ex. 2.

⁹ *Id.*, at 13.

Claimant testified he was diagnosed with bursitis from overworking the shoulder joint from overhead lifting by Dr. Naccarato. Dr. Naccarato's note from that visit indicated that claimant was in physical therapy.

On November 13 or 14, 2011, claimant was approached by Mr. Evans about a medical bill respondent received for claimant's physical therapy. Mr. Evans then terminated claimant on November 16, 2011, for failure to report the injury the day it happened. On November 18, 2011, claimant served a claim for workers compensation on respondent.

Mr. Evans testified he became aware on November 14, 2011, that a workers compensation claim had been filed when he received a physical therapy bill for treatment of claimant's shoulder. Mr. Evans, with Mr. Randall present, asked claimant about the bill and told claimant no workers compensation claim had been filed and that claimant had not reported a work-related injury. Mr. Evans discussed with claimant a conversation they had in September 2011 on the warehouse floor. In September 2011, claimant brought Mr. Evans a doctor's note stating claimant should avoid overhead lifting. According to Mr. Evans, claimant said his right shoulder injury had occurred at a previous place of employment and that claimant had not injured himself working for respondent.

Mr. Evans testified that on November 28, 2011, he prepared a memo which stated he initially spoke to claimant in early September 2011 about claimant's shoulder. The memo also noted that Mr. Evans received a call in late October 2011 from a clinic about claimant filing a workers compensation claim. The memo indicated that on November 14, 2011, he received the physical therapy bill for claimant from William Newton Memorial.

Respondent has a Greif Safety Rule Book, which states that an employee should report an incident that results in an injury before the end of the employee's shift. Failure to do so may result in termination. Mr. Evans testified claimant signed a document on January 24, 2011, affirming he had understood he had to adhere to the rules in the safety rule book. On November 16, 2011, with Mr. Randall present, Mr. Evans terminated claimant for not immediately reporting the incident wherein he was injured to his supervisor or Mr. Evans.

Troy Randall, Production Supervisor, testified that he had daily interaction with claimant and claimant was a good worker and a quiet individual who kept to himself. According to Mr. Randall, in early September 2011, claimant asked to be moved to another job once in a while because of sore shoulders. He tried to honor claimant's request as claimant showed up for work and did not complain. Mr. Randall asked if claimant's injury was work related and claimant indicated he had the shoulder problems for years at his previous jobs.

Mr. Randall testified that he got Mr. Evans involved when claimant brought him the September 29, 2011, note from Ms. Streiff. When the three of them met, claimant told

Mr. Randall and Mr. Evans the shoulder condition was not work related. Mr. Evans and Mr. Randall told claimant they would try to accommodate Ms. Streiff's restriction of no overhead lifting and no lifting more than 20 pounds because he was not claiming an on-the-job injury. Claimant, Mr. Randall and Mr. Evans again met when Mr. Evans got the physical therapy bill. During that meeting claimant did not say whether or not his shoulder injury was work related. Mr. Randall had no other conversations with claimant about the shoulder injury.

In late September or early October 2011, Shawn David, Quality Assurance Specialist, became aware of claimant's shoulder problems after a discussion with claimant. Mr. David noticed claimant's name was on a first aid log several times for using Ibuprofen for various reasons. Several entries were for shoulder pain, but there were also entries for back pain and arthritis to the wrist. According to Mr. David, claimant reported having shoulder pain for several years where the right and left arms rotated.

At the request of his attorney, claimant was seen on January 11, 2012, by Dr. David W. Hufford, an occupational and sports medicine specialist. Claimant gave a detailed description of his work activities to Dr. Hufford. Claimant said he felt a popping in his right shoulder on September 19, 2011, and reported it to his supervisor. After examining claimant, Dr. Hufford's impression was right shoulder pain due to repetitive lifting and overuse, with a suspicion of a labral and/or rotator cuff tear. His opinions as to the cause of claimant's right shoulder pain were:

The causation for his current shoulder pain is the repetitive work activity that he has been involved in for 15 months during his employment with the Greif Corporation. The prevailing factor in his current symptomatology is this repetitive motion with lifting drums of significant weight to a height of at least shoulder level multiple times daily. Based on the AMA Guides to the Evaluation of Disease and Injury Causation, page 185, there is some evidence that the combination of risk factors including force and repetition may lead to the appearance of rotator cuff tendinosis for which he has physical evidence based on his physical examination.¹⁰

Medical records for claimant from 2006 through 2008 were introduced indicating claimant had problems with his left shoulder. Claimant underwent left shoulder MRIs in 2006 and 2008. Claimant testified that he had problems with his left shoulder while working for a previous employer and the main reason he quit the job was because of left shoulder arthritis. Claimant confirmed that prior to September 19, 2011, he complained of left shoulder pain to Mr. Randall, but not right shoulder problems.

The ALJ determined claimant reported his right shoulder problems to a supervisor on September 19 and 29, 2011, and gave notice of his injuries to his supervisor on many occasions. The ALJ did not make a specific finding that claimant's notice included the

¹⁰ P.H. Trans., Cl. Ex. 1 at 2.

time, date, place, person injured and particulars of his injury as required by K.S.A. 2011 Supp. 44-520. However, this was implied by the language of the ALJ's Order, as the ALJ awarded claimant temporary total disability benefits and appointed Dr. Hufford as claimant's authorized treating physician. The ALJ also stated:

The Claimant has no history of problems to his right shoulder. This Court finds that the Claimant was injured out of and in the course of his employment with the Respondent on September 19, 2011, and each and every working day through September 29, 2011, the date the Claimant received medical treatment. The prevailing and only factor for the Claimant's injury was loading and unloading several hundred 55 gallon barrels a day.¹¹

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) provides:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in relevant parts:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

¹¹ ALJ Order (March 21, 2012) at 1-2.

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

. . . .

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

. . . .

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-520 states in pertinent part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹³

ANALYSIS

Claimant's date of injury is September 29, 2011. Claimant alleges he suffered a personal injury by repetitive trauma. K.S.A. 2011 Supp. 44-508(e) states the earliest of four events can establish the date of injury where an injury by repetitive trauma is asserted. Applying K.S.A. 2011 Supp. 44-508(e) to the facts of this claim, claimant's date of accident is September 29, 2011, the date Ms. Streiff gave claimant the restriction of avoiding overhead lifting.

This Board Member affirms the ALJ's implied finding that claimant gave timely notice and that the notice given by claimant included the time, date, place, person injured and particulars of his injury. On September 19, 2011, claimant reported to Mr. Randall of popping in the right shoulder. Claimant reported on September 26, 2011, to Mr. Randall

¹² K.S.A. 2011 Supp. 44-534a.

¹³ K.S.A. 2011 Supp. 44-555c(k).

of experiencing pain in the right shoulder after loading 652 drums. In mid-October, claimant again notified Mr. Randall of a right shoulder injury caused by overhead lifting at work. In these conversations, claimant identified the time, date and place the injury occurred, the person who was injured and the particulars of the injury. Both conversations were within 20 days after claimant sought medical treatment for his right shoulder injury. Respondent presented no evidence that it had designated an individual or department to whom notice must be given and such designation had been communicated in writing to claimant. This Board Member concludes pursuant to K.S.A. 2011 Supp. 44-520(a)(2) claimant gave timely notice to his supervisor.

Claimant testified he had left shoulder problems, but not right shoulder problems, prior to working for respondent. The medical evidence corroborates this. The only medical opinion concerning causation is that of Dr. Hufford. He opined claimant's repetitive work activity was the prevailing factor in causing claimant's symptomatology. Dr. Hufford's opinions on causation and prevailing factor are credible, as claimant would lift steel drums weighing 30 to 70 pounds, 326 drums per hour, for four hours each shift. This Board Member finds claimant met his burden of proof that by a preponderance of the credible evidence: (1) claimant sustained a right shoulder injury by repetitive trauma arising out of and in the course of his employment with respondent, (2) claimant had no history of right shoulder problems prior to working for respondent and (3) claimant's work activities were the prevailing factor causing his present need for medical treatment.

CONCLUSION

1. Claimant's date of injury was September 29, 2011.
2. Claimant gave timely notice as required by K.S.A. 2011 Supp. 44-520.
3. Claimant sustained a personal injury by repetitive trauma arising out of and in the course of his employment with respondent. There was insufficient evidence to prove claimant had a right shoulder condition that preexisted his employment with respondent.
4. Claimant proved by a preponderance of the evidence that his repetitive work activities were the prevailing factor causing his present need for medical treatment.

WHEREFORE, the undersigned Board Member modifies the March 21, 2012, preliminary hearing Order entered by ALJ Clark by finding claimant gave timely notice of his injury to respondent on September 26, 2011. This Board Member affirms the other findings of ALJ Clark's preliminary hearing Order.

IT IS SO ORDERED.

Dated this ____ day of June, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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